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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1663

SUNRAY-DX OIL COMPANY, a Corporation,
Petitioner,

v.

STANDARD INDUSTRIES, INC., a Corporation, and METROPOLITAN PAVING CO., Inc., a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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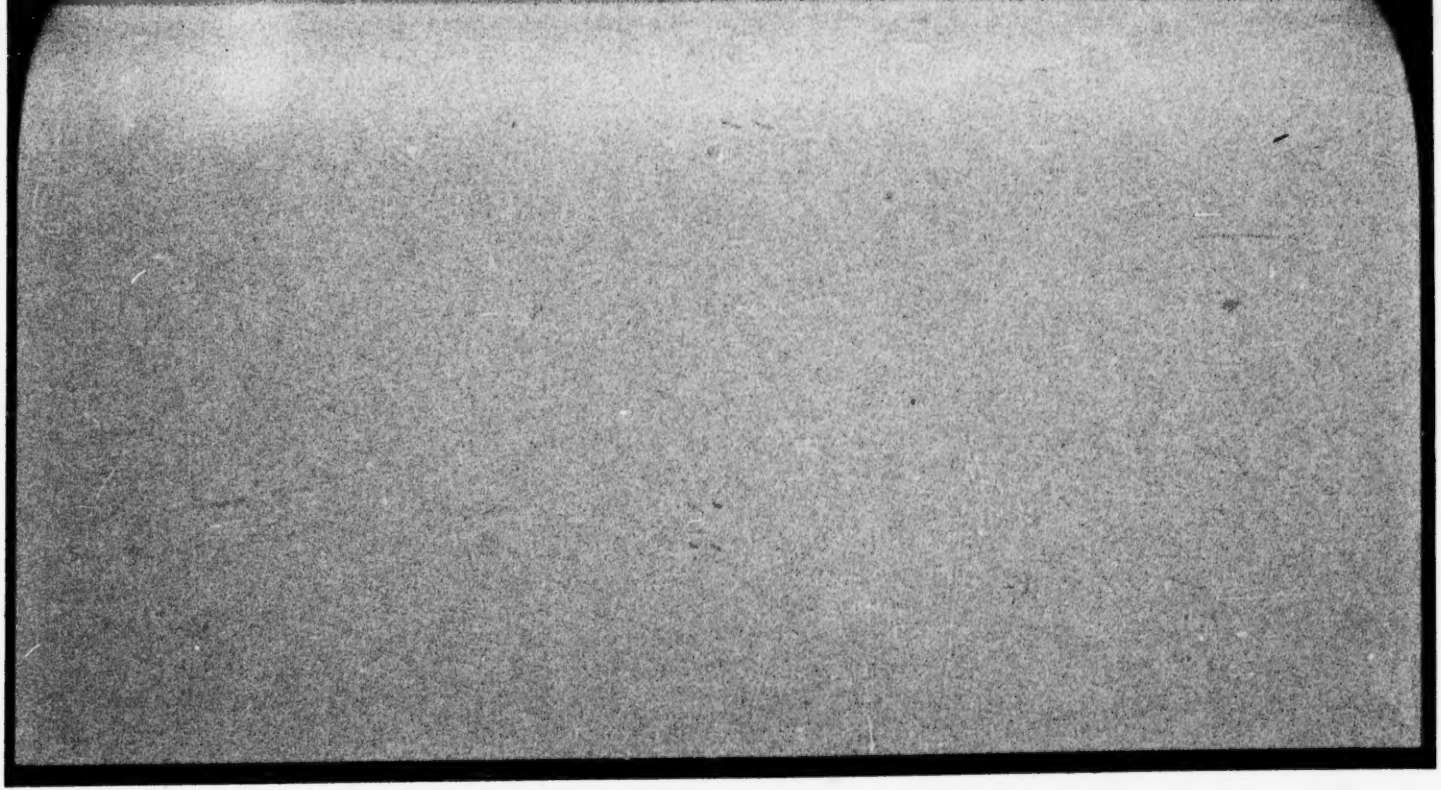

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OCTOBER TERM, 1972.

No. .

SUNRAY-DX OIL COMPANY, A CORPORATION,
Petitioner,

v.

STANDARD INDUSTRIES, INC., A CORPORATION, AND METROPOLITAN PAVING CO., INC., A CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

INTRODUCTION.

Sunray-DX Oil Company, ("Petitioner") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit (sometimes hereinafter referred to as the "Tenth Circuit") entered in this case on March 14, 1973. The district court denied Petitioner's Motions for judgment N. O. V. or for a new trial and entered judgment for plaintiffs on the jury's verdict in Civil Action No. 66-478, Western District of Oklahoma. The Tenth Circuit affirmed that judgment.

A joint Petition for Certiorari has been filed on behalf of all Defendants-Appellees and Cross-Appellants below, addressed to the Tenth Circuit's sanctioning of trial errors which entitled all defendants in Civil Action No. 66-478 to a new trial. Petitioner also joins in that Petition for Certiorari.

OPINIONS BELOW.

Since the District Court's judgment was entered on the jury's verdict, no opinion of that court was written or reported. The opinion of the Court of Appeals for the Tenth Circuit affirming the District Court's denial of Petitioner's motion for judgment N. O. V. or for a new trial, is reported at 475 F. 2d 220 (10th Cir. 1973). [A copy is printed in the Appendix herein.]

JURISDICTION.

The jurisdiction of the Court is invoked under 28 U. S. C. Section 1254(1). The opinion of the United States Court of Appeals for the Tenth Circuit in this case was filed and entered March 14, 1973. Thereafter Petitioner's petition for rehearing was filed on April 4, 1973. On April 27, 1973 the petition for rehearing was denied. This petition for certiorari is filed within ninety (90) days of March 14, 1973.

QUESTIONS PRESENTED.

1. Is not the Tenth Circuit's holding that petitioner was properly adjudged liable under Section 1 of the Sherman Act because the price for liquid asphalt charged by petitioner to one of the plaintiffs was "identical and constant with the price charged by other Oklahoma refiners" in square contravention of the long-standing rule that parallel action is not a violation of the antitrust laws.

2. When a company is named as a defendant in a civil action for treble damages under the antitrust laws based on an alleged price-fixing conspiracy, and when that company did not know of, join or participate in any of the discussions relied on by plaintiff to prove the existence of the conspiracy, did the trial court's error in permitting evidence of those discussions to be admitted as to the company deny it a fair opportunity to have an impartial jury consider only the evidence relevant to the question whether it was involved in the conspiracy.

3. When an antitrust plaintiff fails to present competent and relevant evidence that a defendant knew of, joined or participated in the conspiracy charged, is not the trial court's duty the same as that in any civil action, *i.e.*, to direct a verdict for the defendant or to enter judgment N. O. V.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitutional provision involved is:

The Fifth Amendment to the United States Constitution:

> "No person shall be . . . deprived of life, liberty, or property without due process of law."

The Statutory provisions involved are:

(1) Section 1 of the Sherman Antitrust Act, 15 U. S. C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, is declared to be illegal . . ."

(2) Section 4 of the Clayton Act, 15 U. S. C. § 15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained. . . ."

STATEMENT OF THE CASE.

On December 6, 1966, plaintiffs Standard Industries, Inc. and Metropolitan Paving Co. (hereinafter referred to as "plaintiffs") began this action against twelve defendants, including petitioner. The complaint charged a conspiracy to fix prices and allocate territories and customers in connection with the sale of liquid asphalt, a by-product of the petroleum refining process, to plaintiffs, paving contractors located within the state of Oklahoma, in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1. Plaintiffs claimed treble damages under Section 4 of the Clayton Act, 15 U. S. C. § 15.

Prior to the date plaintiffs' complaint was filed, two indictments had been returned in the Eastern District of Missouri and in the District of Kansas charging separate conspiracies to allocate liquid asphalt bids to the States of Missouri and Kansas respectively. *United States v. Standard Oil Company, et al.*, Criminal Action No. 65-CR-150-3 (E. D. Mo.); *United States v. Wilshire Oil Company of Texas, et al.*, Criminal Action No. KC-CR-873 (D. Kan.). *Petitioner was not named, as a defendant or as a co-conspirator in either of the two indictments.*

At the trial of their claim, plaintiffs rested in part on the fact that when quoting to the State of Oklahoma the price at which it would supply liquid asphalt for a specified duration of time, in whatever quantities the State requested and whenever the State requested, the petitioner and other oil refineries usually quoted their posted prices. Since liquid asphalt, like gasoline, is a fungible product, the posted prices of all refineries were generally identical at a given point in time.[1]

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1. E.g., App. 75, 86-89, 124, 126-128, 1939-1941, 1961-1962, 2002-2003. As used herein "App." refers to the Joint Appendix filed by Plaintiffs-Appellants and Cross-Appellees and Defendants-Appellees and Cross-Appellants below. "Appendix" refers to the Appendix attached to this Petition.

Plaintiffs also pointed to the fact that some refineries located in Oklahoma produced more asphalt than they could market locally, and chose to sell that surplus in states, generally north of Kansas, whose refineries did not produce sufficient liquid asphalt to meet local needs.[2] Petitioner was not one of these surplus-producing refineries. It was able to market the production of its asphalt-producing refinery exclusively in the State of Oklahoma.[3]

Plaintiffs presented no evidence that the above marketing decisions were the subject of or the result of any conspiracy among defendants or other Oklahoma refiners. In fact, the only "conspiracy" evidence introduced involved the bid allocation agreements which had been the subject of the two government indictments returned in the Missouri and Kansas.

At the trial of their action, and over the strenuous objections of petitioner, plaintiffs were allowed to present to the jury the testimony of sixteen witnesses who had been present at discussions concerning the allocation of liquid asphalt bids to the States of Missouri and Kansas. This testimony, comprising well over one-half of plaintiff's case, went into meticulous detail concerning the discussions and the elaborate mechanics of each of the two bid allocations conspiracies which the government's indictments had charged. Even assuming that this testimony was admissible as to the defendants who had been implicated in one or both of these conspiracies, plaintiffs presented not one shred of evidence that any representative of petitioner knew of, joined or otherwise participated in any of the meetings and discussions dealing with sales of maintenance asphalt to the States of Missouri and Kansas, respectively. Each of the three employees of petitioner who handled its

2. E.g., App. 552-554, 1866-1868, 2160-2161, 2384-2385, 2389-2391.

3. E.g., App. 279, 287, 1917-1919, 1947-1949.

asphalt sales testified in this action. Each made clear that he attended no such discussions and knew of none.[4] This testimony was confirmed by every witness who participated in the discussions. Each of the sixteen witnesses who testified concerning those discussions and meetings stated that neither petitioner nor any of its employees or agents was in any way involved.[5]

The testimony of all but two of these witnesses was presented to the jury by deposition. Thus, even before trial of plaintiffs' claim it was obvious that evidence concerning the Kansas and Missouri conspiracies was irrelevant to the question whether petitioner took part in the conspiracy charged by plaintiffs and constituted inadmissible hearsay as to the petitioner. Its prejudicial and inflammatory nature was similarly obvious. Yet the Trial Court denied petitioner's pre-trial motion for a separate trial and its motions before and during trial to exclude this testimony.[6]

Petitioner was thus given the insuperable burden of making clear to the jury that it was not part of the shifting cast of characters who *were* involved in the Kansas and Missouri bid allocation conspiracies. Predictably, the jury returned a verdict finding petitioner liable for the conspiracy in connection with asphalt sales to Oklahoma contractors alleged by plaintiffs. Petitioner's motions for a new trial and for judgment N. O. V. were denied by the Trial court.[7] The petitioner appealed these rulings.

In its opinion affirming these rulings the Tenth Circuit held that plaintiffs had met their burden of proving petitioner guilty of the conspiracy charged by them, citing its conclusion that the evidence established that petitioner had

4. E.g., App. 283-289, 1922-1924, 1939, 1944-1945, 1951-1953, 1956, 1963-1964, 1977-1978.

5. E.g., App. 178-180, 317, 350.

6. App. 3367; 3375-3376; 3503-3504.

7. App. 1513-1514, 2655-2656.

charged one of the plaintiffs the same price for liquid asphalt as other refineries had charged paving contractors [Appendix A17]. The Tenth Circuit appears to have justified admission of the evidence concerning the Kansas and Missouri conspiracies on the ground that, despite petitioner's total non-involvement, it was relevant to demonstrate petitioner's "intent." [Appendix A13].

REASONS FOR GRANTING THE WRIT.

I. The Tenth Circuit's Decision Affirming the Trial Court's Denial of Petitioner's Motion for Directed Verdict and for Judgment N. O. V. Was Based on a Holding That by Establishing That Petitioner Had Engaged in Parallel Conduct in Regard to Its Liquid Asphalt Sales to One of the Plaintiffs, Plaintiffs Had Met Their Burden of Proving the Conspiracy Charged. This Holding Squarely Conflicts With the Decisions Both of This Court and Other Circuits.

In affirming the judgment against petitioner, the Tenth Circuit cited only the "fact" that the price charged one of the plaintiffs by petitioner for liquid asphalt was "identical and constant with the price charged by other Oklahoma refiners." [Appendix A17]. Preliminarily it should be noted that this statement is utterly belied by the evidence. It was demonstrated at trial that the prices charged to paving contractors by Oklahoma refiners varied from refiner to refiner and fluctuated substantially during the time period.[8]

But more important than the fact that the Tenth Circuit ignored this evidence is the cavalier disregard by that Court of the long-standing rule which was reaffirmed by the United States Supreme Court in *Theatre Enterprises, Inc. v. Paramount Film Distributing Company*, 346 U. S. 537 (1954). As stated by Justice Clark in that case:

> "The crucial question is whether [the defendant's] conduct . . . stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.

8. E.g., App., 1197-1201, 1205-1213, 1481-1488, 2224-2227, 2344-2346.

> [citations]. *But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense . . . conscious parallelism has not yet read conspiracy out of the Sherman Act entirely.*" 346 U. S., at 540-541. [Emphasis supplied].

This rule has heretofore been followed by every circuit, including the Tenth Circuit. *E.g., Bendix Corporation v. Balax, Inc.*, 471 F. 2d 149, 160 (7th Cir. 1972); *Cole v. Hughes Tool Company*, 215 F. 2d 924, 940 (10th Cir. 1954); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F. 2d 199 (3d Cir. 1961); *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F. 2d 656 (9th Cir. 1963).

The Tenth Circuit's opinion in the instant case flatly contradicts the above authorities, and in effect announces that in future antitrust trials within that Circuit, proof that a defendant charged its customers the same prices charged by other sellers is a sufficient basis for a finding that defendant violated the antitrust laws, and is sufficient justification for imposing treble damage liability.

II. This Case Presents Important Questions Regarding the Rights of Antitrust Defendants Both to a Fair Trial Uninfected by the Injection of Irrelevant But Highly Prejudicial and Inflammatory Evidence, and to the Protections Afforded Defendants in Civil Actions Generally by the Trial Courts' Duty to Enter a Directed Verdict or Judgment N. O. V. When a Plaintiff's Evidence Affords No Basis for a Reasonable Man's Finding of Liability.

A. The Tenth Circuit's Decision Abrogates the Only Protection Heretofore Afforded by the Co-Conspirator Exception to the Hearsay Rule to Antitrust Defendants Who Can Demonstrate That They Did Not Know of, Join, or Participate in the Conspiracy Charged by an Antitrust Plaintiff.

Over one-half of plaintiff's case against petitioner consists of elaborate descriptions of discussions and meetings concerning sales to the States of Kansas and Missouri, even though the evidence clearly demonstrated that petitioner was not involved in any way.[9] The prejudice to Petitioner of this procedure is incalculable. Particularly impossible to see how a jury could sift from this wealth in view of the inflammatory nature of such evidence, it is of "conspiratorial" detail the necessarily brief, and simple, statements which established petitioner's total non-involvement.

Faced with the question whether this testimony should be admitted at petitioner's trial, it was the trial court's duty to weigh its utter lack of probative value against its

9. At trial plaintiffs asserted that a customer of petitioner's, who was implicated in the Missouri conspiracy, was petitioner's agent. The evidence utterly failed to establish that contention and the trial judge so ruled [E.g., Tr. 1381-1383, 4378-4379, 4381-4384]. Plaintiffs did not appeal that ruling.

undeniable prejudicial effect. *E.g., International Shoe Machine Corporation v. United Shoe Machinery Corporation,* 315 F. 2d 449, 459-460 (1st Cir. 1963) [Antitrust action], *cert. den.,* 375 U. S. 820 (1963); *McCormick, Evidence* (1954), § 152, at 319. The trial court failed to do so, thereby imposing on petitioner a burden which has been vividly, and accurately, described by Justice Jackson in *Krulewitch v. United States,* 336 U. S. 440 (1949) [Concurring opinion]:

> ". . . the accused . . . is confronted with a hodge-podge of acts and statements by others which he may never have authorized or intended or even known about. . . . The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction. [Citations omitted.]
>
> * * *
>
> "There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." 336 U. S., at 453-454.

No charge or cautionary instructions to the jury could erase the inevitable effect of this evidence or eliminate the risk that the jury would improperly base a verdict against petitioner on the wrongful acts of others. See, *e.g., Bruton v. United States,* 391 U. S. 123, 126-129 (1968). Given the inflammatory nature of this evidence, it is improbable that the jury was able, or even willing, to undertake the analysis which would distinguish petitioner from the mass of defendants and alleged co-conspirators. By allowing this evidence to be admitted the trial court

effectively deprived petitioner of its right to have an impartial jury consider as to it, only evidence which was relevant to the question whether petitioner knew of or participated in the conspiracy alleged by plaintiffs.

Plaintiffs in this action never satisfied the conditions which past decisions of this Court and other Circuits (including the Tenth) have said must be met before such hearsay testimony as that concerning Kansas and Missouri meetings is admissible against a defendant who was not present at such meetings. It has long been clear that before such testimony can be admitted against a defendant, the connection of that defendant with the conspiracy must be proved by evidence other than the statements of those alleged to be co-conspirators. As was held by this Court in *Glasser v. United States*, 315 U. S. 60, 74 (1941):

> "such declarations are admissible over the objections of an alleged co-conspirator, who was not present where they were made, only if there is proof *aliunde* that he is connected with the conspiracy."

Accord, *e.g.*, *Glover v. United States*, 306 F. 2d 594, 595 (10th Cir. 1962); *Bartlett v. United States*, 166 F. 2d 920, 924 (10th Cir. 1948).

In this case the testimony of the Kansas and Missouri conspirators alone destroyed any basis for the admission of their testimony against petitioner. By sanctioning the admission of this testimony against petitioner, the Tenth Circuit has denied to antitrust defendants embroiled in trials involving other defendants the only protection heretofore afforded them against being subjected to crippling treble damages liability because of the misdeeds of others.

And it has done so on the basis of a rationale which eliminates the previously applied conditions for admission of this sort of hearsay testimony. The Tenth Circuit held

that such evidence is admissible "when intent is an issue" as to a defendant's actions "'to illustrate or establish his intent or motive in the particular act directly in judgment'" (quoting from *Kansas City Star Company v. United States*, 240 F. 2d 643, 650 (8th Cir. 1957), *cert. den.* 354 U. S. 973 (1957)) [Appendix A13]. As applied to petitioner this rationale supported the admission of testimony concerning the statements and actions of persons in no way related to petitioners with respect to matters of no interest to petitioner. Such a rule virtually guarantees that future antitrust defendants in the Tenth Circuit will be denied their right to a fair trial before an impartial jury.

B. The Tenth Circuit's Decision Denies to Antitrust Defendants the Protection Accorded Defendants in Civil Litigation Generally by the Trial Courts' Duty to Carefully Analyze the Evidence Presented by a Plaintiff in Support of a Defendant's Liability and to Enter a Directed Verdict or Judgment N. O. V. Wherever That Evidence Is Insufficient to Permit a Jury of Impartial and Reasonable Men to Find Liability.

Petitioner recognizes the general rule that when considering a Motion for a Directed Verdict or Judgment N. O. V. a trial court must review and consider the evidence as a whole. But such consideration must be based upon careful analysis of each link in the chain offered by plaintiffs as proof of the conspiracy alleged. The trial courts' duty was accurately summarized in *United States v. Morgan*, 118 F. Supp. 621 (S. D. N. Y. 1953). [Dismissing Civil Antitrust Complaint.] There, the Court emphasized that when assessing the sufficiency of the evidence supporting an antitrust claim:

> "The answer must not be found in some crystal ball or vaguely sensed by some process of intuition, based upon a chance phrase used here or there, but in the evidence adduced in the record of the case which must be carefully sifted, weighed and considered in its every aspect" 118 F. Supp., at 634.

The only evidence even mentioning petitioner or its employees in connection with any anticompetitive actions was presented as part of plaintiffs' rebuttal, in which an employee of an Oklahoma contractor testified, in response to leading questions by plaintiffs' counsel, that he believed that another defendant and petitioner had caused a slowdown in his asphalt purchases from a Kansas refiner.[10] But such a "belief" is not competent evidence that petitioner in fact was responsible for any reduction in such purchases. Over the objection of petitioner, plaintiffs also introduced a letter purportedly written by the President of that Oklahoma contractor in which he said:

> "I appreciate you picking up a few loads of asphalt as our tanks are nearly full and movement has not started to any great extent in this area. However, as I advised Mr. Jones, I do not think it advisable for us to sell you too great a quantity as no doubt DX again would complain to Mobil and get us all in trouble."[11]

As to petitioner this letter was triple hearsay and its admission was error. But even assuming the letter was correctly admitted as to petitioner, it simply could not form the basis for any inference that petitioner engaged in any anti-competitive activities. And the evidence at trial overwhelmingly demonstrated that the petitioner at no time

10. App. 2588-2589.

11. App. 3157.

knew of or joined in any discussions or conspiracy concerning sales to any customer in the State of Oklahoma.[12]

In short, plaintiffs presented no evidence which could reasonably support the inference that petitioner knew of, joined or participated in the conspiracy alleged by them. By allowing such a case to go to the jury, the trial court erroneously sanctioned a decision based upon mere speculation and conjecture. See, *e.g., Dahl, Inc. v. Roy Cooper Co.*, 448 F. 2d 17 (9th Cir. 1971) [Antitrust Claim. Affirming Summary Judgment for Defendants]; *Dovberg v. Dow Chemical Company*, 353 F. 2d 963 (3d Cir. 1965) [Antitrust Claim. Affirming grant of Judgment N. O. V. for two defendants], cert. den. 384 U. S. 907 (1965); *Cole v. Hughes Tool Company*, 215 F. 2d 924, 940-941 (10th Cir. 1954) [Reversing judgment for counterclaimant on antitrust counterclaim to patent infringement action], *cert den.*, 348 U. S. 927 (1955); *Schad v. Twentieth Century-Fox Film Corporation*, 136 F. 2d 991, 995 (3d Cir. 1943) [Antitrust Claim. Affirming Directed Verdict For Defendants and Dismissal of Plaintiffs' Claim].

By affirming the trial court's judgment with a general reference to "evidence, both direct and circumstantial," the Tenth Circuit has, in effect, instructed trial courts that in future antitrust cases, when a defendant moves for directed verdict or judgment N. O. V., the answer to the question whether the plaintiff has met his burden of proof can be found by some vague process of intuition or surmise. The Tenth Circuit has thus sanctioned a procedure whose inevitable effect will be that future antitrust defendants embroiled in a joint trial with other defendants may be found liable for treble damages solely on the basis of the prejudicial and inflammatory effect of the evidence of misdeeds of others which inevitably will be introduced in such trials.

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12. E.g., App. 283-289, 1922-1924, 1944-1947.

CONCLUSION.

For many years antitrust plaintiffs, riding a wave of enthusiasm for their role as "private attorneys general", have increasingly been accorded privileges detrimental to the rights of defendants, such as that of introducing evidence of little or no probative value but of undeniably inflammatory and prejudicial effect. As a result, the rights of defendants in such trials have been eroded to such an extent that they no longer receive the benefit of protections normally accorded defendants in civil actions, and they are thereby denied their right, secured by the Fifth Amendment to the United States Constitution, to a fair trial before an impartial jury.

In the instant case, petitioner was not named in either of the indictments on which the plaintiffs purported to base their case, and all evidence, including the plaintiffs', demonstrated it was never involved in any of the conspiracies alleged. Nonetheless, it was found liable, solely on the basis of the wrongdoing of others, or alternatively on the basis of its compliance with economic law which demands that its products be priced consistently with the identical products sold by others.

The holding below that parallel action violates Section 1 of the Sherman Act squarely contradicts this Court's decisions and must be reversed for that reason alone. In addition, the Tenth Circuit's decision has sanctioned so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Thus, this case presents a unique and compelling opportunity for this Court, in the exercise of its responsibility for ensuring the proper functioning of the federal judiciary in the administration of federal statutes, to re-affirm that antitrust defendants must be accorded the same protections as all other defendants in civil actions,

particularly those necessary to ensure a fair trial and due process of law.

Respectfully submitted,

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Dated: June 11, 1973

CERTIFICATE OF SERVICE.

I hereby certify that on this 11th day of June, 1973, three copies of the Petition for Certiorari of Sunray-DX Oil Company were mailed by air mail, postage prepaid, to Barefoot, Moler & Claro, 1405 City National Bank Tower, Oklahoma City, Oklahoma 73102, Attorneys for Respondents.

I further certify that all parties required to be served have been served.

/s/ JOHN J. RUNZER,
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Attorney for Sunray-DX Oil Company, Petitioner.

March 14, 1973

Appendix.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT.

JANUARY TERM, 1973.

Nos. 71-1115, 71-1116, 71-1117, 71-1118, 71-1119.

STANDARD INDUSTRIES, INC., A CORPORATION, AND METROPOLITAN PAVING CO., INC., A CORPORATION,
Plaintiffs-Appellants,

v.

MOBIL OIL CORPORATION, A CORPORATION, SUNRAY-DX OIL COMPANY, A CORPORATION, KERR-McGEE CORPORATION, A CORPORATION, AND PHILLIPS PETROLEUM COMPANY, A CORPORATION,
Defendants-Appellees and Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

(D. C. No. 66-478)

Bert Barefoot, Jr., and John Anthony Claro (Edward H. Moler, Barefoot, Moler & Claro, and Joseph A. Claro of Counsel, on the brief), for Plaintiffs-Appellants.

A. Duncan Whitaker (Edward F. Howrey and Michael M. Levy; Charles F. Rice, S. M. Groom, Jr., Howrey, Simon, Baker & Murchison, of Counsel, on the brief), for Defendant Mobil Oil Corporation, Appellee & Cross-Appellant.

John J. Runzer (John A. Ladner, Jr., Edith G. Laver, Pepper, Hamilton & Scheetz, on the brief), for Defendant Sunray-DX Company, Appellee & Cross-Appellant.

Coleman Hayes (Willard P. Scott, Carl G. Engling, Monnet, Hayes, Bullis, Grubb & Thompson, on the brief), for Defendant Kerr-McGee Corporation, Appellee & Cross-Appellant.

Richard B. McDermott (Boesche, McDermott & Eskridge, and S. E. Floren, on the brief), for Defendant Phillips Petroleum Company, Appellee & Cross-Appellant.

Before LEWIS, *Chief Judge*, McWILLIAMS, *Circuit Judge*, and THEIS, *District Judge*.

McWILLIAMS, *Circuit Judge*.

This is a civil antitrust action brought by two corporations to recover damages incurred when they purchased liquid asphalt, to be utilized in the construction of roads, highways, runways and the like, at a "rigged" price in excess of fair market value, such price rigging allegedly having been the result of an unlawful combination and conspiracy in restraint of trade in violation of the provisions of the Sherman Act and the Clayton Act. 15 U. S. C. § 1, *et seq.* The defendants named in the complaint were numerous petroleum refiners and marketing entities which produced and sold liquid asphalt as a by-product of the crude oil cracking process.

The two corporations which instituted the proceedings are Standard Industries, Inc., a Delaware corporation, and Metropolitan Paving Company, Inc., an Oklahoma corporation, both general construction contractors with the former headquartered in Tulsa, Oklahoma, and the latter in Oklahoma City, Oklahoma.

As indicated, the defendants were various petroleum refiners and marketing entities located in Oklahoma and Kansas and initially were some twelve in number. Settlement was made with certain defendants prior to trial. Upon trial, the jury returned a verdict in favor of one defendant, Skelly Oil Company of El Dorado, Kansas, and against the four remaining defendants. Those four are: (1) Mobil Oil Corporation, which operated a refinery in Augusta, Kansas; (2) Sunray DX Oil Company, which operated a refinery in Tulsa, Oklahoma; (3) Kerr-McGee Corporation, which operated refineries at Wynnewood and Cushing, Oklahoma; and (4) Phillips Petroleum Company, which operated refineries at Okmulgee, Oklahoma, and at Kansas City, Kansas.

An eight-week trial culminated in the submission to the jury of a series of special interrogatories. The jury found, *inter alia*, that the four defendants had conspired to fix the price of liquid asphalt purchased by plaintiffs in Oklahoma from January 1962 to December 1966; that plaintiffs had suffered damages by way of an "overcharge" during the existence of the conspiracy; and that none of the "overcharge" had been "passed-on" by either of the plaintiffs.

Based, then, on the jury's various answers to the special interrogatories, the trial court entered a judgment in the sum of $133,684.06, together with the sum of $42,000 for attorney's fees, plus costs in the amount of $3,550.22, in favor of Standard and against the four petroleum companies which the jury found guilty of antitrust violations.

As concerns Metropolitan, judgment was entered in its favor and against the same four companies in the sum of $286,128.01, together with the sum of $84,000 for attorney's fees, plus costs in an amount of $7,100.44. In sum, judgment was entered in favor of the two plaintiffs against the four petroleum companies, jointly and severally, in a total amount of $556,462.73, such sum taking into account previous settlements made with other defendants prior to trial. All parties now appeal.

Standard and Metropolitan complain here about the amount of their judgment, and seek a new trial limited to the issue of damages. The four appealing defendants, i.e., Mobil, DX, Kerr-McGee, and Phillips, on a variety of grounds seek a new trial limited to the issue of liability. These wide-ranging grounds of alleged error will be grouped into two categories: Alleged Pre-Verdict Error and alleged Post-Verdict Error.

ALLEGED PRE-VERDICT ERROR.

1. *Treble Damage Instruction.*

Section 15 of 15 U. S. C. provides that any person injured by reason of anything forbidden in the antitrust laws may sue therefor "and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." In regard to the matter of damages, the trial court instructed the jury as follows:

> "* * * If you should find, from a preponderance of the evidence in this case, that plaintiff is entitled to recover, your verdict will be for only such amounts as you shall find from the evidence in the case is reasonably necessary to compensate the plaintiff for damages proximately caused by one or more of the violations of the Federal antitrust laws, which the plaintiff has al-

leged. *You will not treble that amount, nor will you include any sums for costs of suit, or for a reasonable attorney's fee, since that is no part of the jury's function. That is a question for the court, in the event the jury return a verdict in favor of the plaintiff for actual or compensatory damages.*" (Emphasis added.)

The plaintiffs contend that the giving of the aforesaid instruction constituted reversible error because such was "inherently unfair" in that it placed on the plaintiffs the burden of explaining why they should ultimately recover three times their actual damage and, in practical effect, necessarily caused the jury to adjust downward its damage award.

In thus arguing, plaintiffs rely on our recent case of Semke v. Enid Automobile Dealers Association, 456 F. 2d 1361 (10th Cir. 1972), decided by us after the trial of the instant case. In *Semke*, after recognizing that there was a split of authority on the matter, we held that it was error to give an instruction which informed the jury that its damage award *would* be trebled by the court, but that in the context of that case it was only harmless error. We adhere to the rule of *Semke*, but here, as in *Semke*, under the circumstances any error is deemed harmless.

In pre-trial newspaper publicity of considerable proportions, the jury panel was without doubt made aware of the fact that this was a treble damage action. Such publicity included articles published in the local Oklahoma newspapers between 1966 and 1969 concerning not only the nature of the claim asserted in the instant case, but also articles relating to the antitrust action brought by the State of Oklahoma in regard to the State's purchases of the same types of liquid asphalt. Many of these articles stated that the suits involved amounts which were triple

the amount of damages allegedly suffered. Furthermore, in closing argument there was some comment by counsel concerning the treble damage aspect of the case, although such was said to be in anticipation by counsel that the trial court would instruct on the matter. And in the instructions other than the particular part here complained about, reference was made that under the Clayton Act the injured party should recover "threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

In addition, as will later be more fully developed, the witness Kavanaugh, president of Metropolitan, in violation of an order of court, in a voice inaudible to the court and counsel, but audible to the court reporter and at least some jurors, volunteered that he had already incurred expenses in the sum of $150,000.

It was in this general setting, i.e., considerable pretrial publicity, some discussion about treble damages in closing argument, and misconduct by the witness Kavanaugh, that the court felt constrained to affirmatively instruct the jury that in the event it found for the plaintiffs it should award the plaintiffs their actual damages, and that the matters of trebling, costs and attorney's fees were "no part of the jury's function" and were "questions" for the court. Under such circumstances, we conclude that the giving of the instruction in question did not constitute reversible error. Repeating, the jury was correctly instructed as to the damages that could be awarded and then simply informed that the other matters, i.e., trebling, costs, and attorney's fees were "questions" for the court. We perceive no prejudice to the plaintiffs from the instructions thus given.

Nor are we convinced by the further argument on this point that the jury did in fact reduce its damage award by

fixing plaintiffs' damages at exactly one-third what the evidence indicated it was entitled to. This assumes that the plaintiffs' evidence compelled the jury to assess their damage at the rate of 3¢ per gallon of liquid asphalt purchased. We do not view the evidence as compelling any such result. The extent of plaintiffs' damages was, as were most of the issues in the case, disputed issues and the jury's monetary award finds support in the record.

2. *"Passing on" Instruction.*

As above indicated, the two plaintiffs were general construction contractors and as an incident to their business both used so-called "asphaltic concrete," which is made by mixing aggregates, such as sand, crushed rock, and the like, with liquid asphalt. The liquid asphalt was purchased by the plaintiffs from certain of the defendants and such, of course, forms the root of this entire controversy. In this regard, one of the defenses raised by the defendants was that the plaintiffs had merely "passed on" to those with whom the plaintiffs dealt any overcharge suffered by plaintiffs at the hands of any of the defendants. The instruction given the jury on this particular matter is set forth below.[1]

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1. "INSTRUCTION No. 27

"PASS-ON DEFENSE: As one of the defenses herein the defendants contend that even though the jury should find that a conspiracy existed which resulted in artificially high prices for liquid asphalt the plaintiffs nonetheless may not recover in this case because of their failure to show that they were thereby injured in their business or property. In this connection it is alleged by defendants that whatever price the plaintiffs paid for asphalt was shifted or 'passed-on' to those with whom plaintiffs contracted and by reason thereof the contractors, as middlemen, suffered no loss whatever.

"In your consideration of this issue you are told that in cases of this nature the 'pass-on' defense, while sometimes proper, has rather limited application and is generally available only to a 'cost-plus' contractor or to a middleman who buys a product then resells

By its answer to special interrogatories, the jury determined that neither of the plaintiffs had "passed on" any overcharge. The plaintiffs now argue that the giving of the instruction on "passing on" was error under Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U. S. 481 (1968), and that notwithstanding the finding by the jury that there was no "passing on," the very giving of the instruction tended to prejudice the plaintiffs' entire case in the eyes of the jury. We disagree.

In the first place, it requires a degree of clairvoyance that we do not possess to conclude that the jury's finding that the plaintiffs did *not* pass on the overcharges somehow prejudiced the plaintiffs' entire case in the eyes of the jury. Such reasoning we do not follow. *See* Kermaree v. Compagnie Generale Transatlantique, 358 U. S. 625 (1959) at 629; Bass v. Dehner, 103 F. 2d 28, at 34 (10th Cir. 1939), *cert. denied*, 308 U. S. 580 (1939).

Furthermore, as we read Hanover, at 494, the Supreme Court did not completely rule out passing-on as a defense in an action of this nature. Indeed, the court recognized "that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." In our view, the instruction given does not offend *Hanover* and was narrowly drawn so as to be in accord with the fore-

1. (Cont'd.)
same in unchanged form to a consumer under such condition that the original cost and handling charges can be traced with a fair degree of certainty. If, while in the hands of the middleman, the product is processed so as substantially to lose its identity and form and the processing costs are incapable of exact calculation, the defense of 'pass-on' becomes unavailable. The burden rests with defendants to prove the defense of 'pass-on' as is heretofore stated in these instructions."

going language from *Hanover*. For these reasons, we find no error in the giving of this instruction.

3. *Peremptory Challenges.*

The trial court granted each of the two plaintiffs three peremptory challenges, making a total of six for the two, and granted each of the five defendants who went to trial two peremptory challenges, to be exercised separately, making a total of ten challenges for the defendants. The plaintiffs now complain that granting to them a total of six peremptory challenges, as contrasted to the ten granted the defendants, constitutes reversible error, even though the jury ultimately selected found in their favor and awarded substantial damages. It is difficult for us in this situation to find any prejudice to the plaintiffs. Also, in our view prejudice is not shown by pointing out, by way of hindsight, jurors whom the plaintiffs would have peremptorily challenged if they had been allotted ten challenges, instead of six. Be that as it may, we find no error on the part of the trial court in its order regarding peremptory challenges.

Section 1870 of 28 U. S. C. initially provides that each party in a civil case shall be entitled to three peremptory challenges. Such was afforded the two plaintiffs, though each of the five defendants did not get three peremptory challenges, only two. That same statute also provides that multiple plaintiffs or defendants "may" be treated as a single party or the trial court "may" allow additional peremptory challenges and "may" permit them to be exercised either jointly or separately. By use of the word "may," we have held that this latter provision confers a judicial discretion on the trial court. John Long Trucking, Inc. v. Grecar, 421 F. 2d 125 (10th Cir. 1970). In the instant case, we find no abuse of that discretion. See Albina Engine and Machine Works, Inc. v. Abel, 305 F. 2d 77 (10th Cir. 1962).

See also Nehring v. Empresa Lineas Maritimas Argentinas, 401 F. 2d 767 (5th Cir. 1968), *cert. denied*, 396 U. S. 819 (1969), where it was held that the plaintiff did not have a *right* to the same number of peremptory challenges as granted multiple defendants.

4. *Evidence of Alleged Conspiracies Involving Sales of Liquid Asphalt in Kansas and Missouri.*

By answer to a special interrogatory, the jury determined that the four appealing defendants, i.e., Mobil, DX, Kerr-McGee, and Phillips, had conspired to fix, maintain and stabilize the price of liquid asphalt purchased by the plaintiffs in Oklahoma. As a part of their case, the plaintiffs, over objection, introduced evidence that the conspiracy in question did not respect state boundaries and that its effect was felt in Kansas and Western Missouri to the end that there was price fixing by certain of these defendants, and others, in those areas, as well as in Oklahoma. Expert testimony adduced by the plaintiffs was to the effect that the relevant economic market included not only Oklahoma, Kansas and Western Missouri, but included also such states as Nebraska, South Dakota, Iowa, Minnesota, and Wisconsin.

It was an integral part of plaintiffs' theory of the case that the Oklahoma refiners agreed not to market in Kansas, and that the Kansas refiners in turn agreed not to market in Oklahoma, to the end that the barrier between these two states was described by some as being a veritable "Berlin Wall," through which liquid asphalt did not pass from one state to the other, although *other* petroleum products flowed freely between the two states. And as the culmination of the conspiracy, the price for liquid asphalt in Oklahoma, according to the plaintiffs, was then set artificially high to the end that bids by refiners to both the state and private

contractors were invariably identical and constant in the price bid. Similarly, in Kansas the Kansas refiners, free from Oklahoma competition, set their price for their liquid asphalt sold in Kansas.

As concerns Western Missouri, it was plaintiffs' theory of the case that the Kansas and Oklahoma refiners "co-operated" in this area and divided up the market at prices mutually agreed upon.

Regarding Nebraska, South Dakota, Iowa, Minnesota, and Wisconsin, plaintiffs contended that the defendants and the other coconspirators did engage in real price competition in those areas. And in our view of the record, there is evidence, both direct and circumstantial, to support this general theory of the case.

Upon trial, defendants objected strenuously to the introduction of any evidence pertaining to the existence of any conspiracy involving any defendant extending into Kansas or Western Missouri. Such evidence was said to be irrelevant and highly prejudicial. These objections were overruled and the defendants now assign such ruling as error necessitating a new trial on the issue of liability only. We perceive no error in this particular regard.

The evidence of the activities of these defendants, and others, in Kansas and Missouri was a part of an overall scheme and had relevance and probative value as tending to circumstantially prove the particular facet of the conspiracy which ended in price fixing in Oklahoma operating to the detriment of the plaintiffs. Noerr Motor Freight v. Eastern Railroad Presidents Conference, 155 F. Supp. 768 (E. D. Pa. 1957), *aff'd per curiam*, 273 F. 2d 218 (3d Cir. 1959); *rev'd on other grounds*, 365 U. S. 127 (1961), contains pertinent comment on this particular matter. In that case, the trial court declared as follows:

> "Because of the magnitude and importance of the case the Court permitted great latitude in the intro-

duction of evidence. The trial court in any antitrust case has wide discretion in the admission or exclusion of cumulative and collateral evidence * * *. The evidentiary problems arising at trial may be placed in six distinct categories. The first relates to the admission into evidence, over the strenuous objection of the defendant, of proof of activities in the railroad-Byoir campaign which occurred outside of Pennsylvania. Since the conspiracy was not originated in Pennsylvania, the proof of outside activities was important, not only to show its formation but to show its method of operation, all of which had a great bearing on the fundamental question of intent and injunctive relief, if an illegal conspiracy actually existed. The complaint charged an overall conspiracy in the whole of the northeastern part of the United States. *Because the plaintiffs limited themselves to proof of damages only within the State of Pennsylvania, the defendants contend that plaintiffs should be likewise limited in proof of the conspiracy. Such result, of course, does not follow.* * * *" (Emphasis added.)

Counsel contend that our holding in United States v. Wilshire Oil Company of Texas, 427 F. 2d 969 (10th Cir. 1970), *cert. denied*, 400 U. S. 829 (1970), was that the Missouri and Kansas conspiracies were each distinct from the other and that accordingly each was necessarily distinct from any Oklahoma conspiracy to the end that evidence of either a Kansas or Missouri conspiracy would not be competent evidence of an Oklahoma conspiracy. Such, in our view, does not necessarily follow. The fact that in *Wilshire* we held that the Kansas and Missouri conspiracies were separate and distinct, to the end that *Wilshire* in the Kansas criminal antitrust proceeding could not avail itself

of the plea of double jeopardy based on its prior conviction in the Missouri criminal proceeding, does not resolve the present matter. Even assuming that the Kansas, Missouri and Oklahoma conspiracies were distinct, such does not mean that evidence of the first two is inadmissible in a case grounded on purchases made by the plaintiffs in Oklahoma. Certainly on the record before us such were so interrelated that evidence of one was some evidence of the other. *See* American Medical Ass'n v. United States, 130 F. 2d 233 (D. C. Cir. 1942), at 251-52, *aff'd*, 317 U. S. 519 (1942), and Greater New York Live Poultry Chamber of Commerce v. United States, 47 F. 2d 156 (2d Cir. 1931), at 159, *cert. denied*, 283 U. S. 837 (1931).

In short, then, the jury in our view was entitled to know the full story and the trial court did not err in refusing to limit the plaintiffs to proof of events occurring within the territorial limits of the State of Oklahoma. *See also*, for example, Kansas City Star Company v. United States, 240 F. 2d 643 (8th Cir. 1957), *cert. denied*, 354 U. S. 923 (1957), where it was declared, at 650, that when intent is an issue, as it was here, it has always been deemed proper, in civil or criminal antitrust proceedings, to introduce "evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment."

5. *Admitting Evidence to the Effect That the State of Oklahoma Was Interested in Plaintiffs' Claim.*

The State of Oklahoma had previously brought a civil antitrust action against DX, Kerr-McGee, and Phillips seeking treble damage for liquid asphalt purchased by it. Trial in that proceeding ended in a substantial judgment for the State. There was no direct appeal, as such, from

that judgment, the matter being settled, although one facet of the case was later before us in State of Oklahoma ex rel. Wilson v. Blankenship, 447 F. 2d 687 (10th Cir. 1971), *cert. denied*, 405 U. S. 913 (1972).

The trial court's ruling in the instant case was that there would be "no mention" of the antitrust claim successfully asserted by the State. However, in the present proceeding, the plaintiffs did call as its witnesses numerous state officials who had testified in the earlier trial. Additionally, certain exhibits used in the earlier trial were also marked and used in the instant one. The defendants now claim this to be error, arguing that the jury was necessarily apprised of the successful antitrust claim of the State, and that such inevitably worked to their detriment. This argument is untenable. Certainly the plaintiffs were not precluded from calling as their witnesses various state officials and using exhibits prepared by them for the earlier case, assuming the witnesses were otherwise competent and the exhibits otherwise relevant and material to the issues in the present case.

6. *Admission of Inadmissible Evidence.*

Defendants assert the case should be reversed because the trial court admitted, over objection, evidence which was allegedly inadmissible and highly prejudicial. In thus arguing, counsel includes such items as: (1) Permitting the plaintiffs' two economists to testify as to the ultimate issue in the case, i.e., the existence of a conspiracy on the part of the defendants; (2) admitting a letter which tended to impeach the testimony of the president of an asphalt-producing refinery which marketed through Mobil, the witness having previously been called by Mobil as its witness, when no proper foundation had been laid; (3) permitting the introduction of hearsay evidence, and the like.

We do not propose to get into any extended discussion of evidentiary matters such as those enumerated above. We would note, in passing, that all of the economists who testified upon trial, two being called by the plaintiffs and three by the defendants, expressed their opinions as to the "competitive" or, as the case may be, the "noncompetitive" nature of the liquid asphalt market and some no doubt did come close to giving an opinion as to whether there was or was not a conspiracy. However, such is not necessarily error. As early as New York Life Insurance Co. v. Doerksen, 64 F. 2d 240 (10th Cir. 1933), and Francis v. Southern Pac. Co., 162 F. 2d 813 (10th Cir. 1947), *aff'd*, 333 U. S. 445 (1948), we held that in a wide range of cases where the issue is one with which a lay juror is unfamiliar, expert testimony is not only admissible, but that, as was said in *Francis*, it was "not a well-grounded objection that the opinion elicited from the expert relates to the issue to be resolved by the jury."

Be that as it may, any possible error on the part of the trial court in the reception of evidence at trial would under the circumstances of this case be only harmless error. Fed. R. Civ. P. 61 specifically refers to error in the admission of evidence and declares that such error is not ground for ordering a new trial unless such be deemed "inconsistent with substantial justice." None of the alleged error with respect to the admission of evidence in the instant case meets that test. Moreover, in this regard it is difficult for us to believe that the outcome of an eight-week jury trial could turn on the allegedly inadmissible evidence here complained about by the defendants.

Finally, it has been held that in an antitrust case the trial court has a wide discretion in the admission or exclusion of cumulative or collateral evidence. Noerr Motor Freight v. Eastern Railroad Presidents Conference, *supra*,

citing, at 836, United States v. General Motors, 121 F. 2d 376 (7th Cir. 1941), *cert. denied*, 314 U. S. 618 (1941), and Kansas City Star Company v. United States, 240 F. 2d 643 (8th Cir. 1957), *cert. denied*, 354 U. S. 923 (1957). For all these reasons, then, we conclude that there was no reversible error committed by the trial court in any of its rulings on the admissibility of evidence.

7. *Misconduct of Witness Kavanaugh.*

A. J. Kavanaugh, president of Metropolitan, was called as a witness by the plaintiffs and was examined and cross-examined at great length. The trial court ruled that he could not testify as to the expense allegedly incurred by him in preparing and pressing his claims against the defendants. In violation of that order, Kavanaugh, apparently in an aside to the jury, did assert that he had borrowed $150,000 to pay his share of the expense incurred in pushing his claim against the defendants. This remark, which occurred simultaneously with an objection to a question posed to the witness, was not heard by court or counsel, but was recorded by the court reporter. The entire matter apparently came to light sometime later, at which time the trial court refused the defendants' request that a mistrial be declared. The defendants now assert that they are entitled to a new trial, presumably on the issue of liability only, because of this incident, which is said to have prejudiced their case to the extent that an instruction to disregard was insufficient to insure a fair and impartial trial. We disagree.

The matter of declaring a mistrial, or not, because of improper, voluntary statements of a witness varies according to the atmosphere of each trial. Beck v. Wings Field, Inc., 122 F. 2d 114 (3d Cir. 1941). Of necessity it is a matter peculiarly within the sound discretion of the trial judge. He is on the scene and is in a better position than

we, as a reviewing court, in assessing the potentially prejudicial impact of conduct such as that ascribed to Kavanaugh. In the instant case, the trial judge was very concerned, and rightly so, with Kavanaugh's misconduct and its possible effects, but felt, after holding a hearing *in camera* on the matter, it was not of such proportions as to necessitate declaring a mistrial. And our review of the record has disclosed nothing which would lead us to conclude that the trial judge abused his discretion in this regard. *See*, for example, Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F. 2d 679 (8th Cir. 1966).

8. *Insufficiency of Evidence as to Mobil and DX.*

Mobil and DX contend that there is insufficient evidence that either of them was involved in the conspiracy about which the plaintiffs complain to the end that a directed verdict should have been entered in their favor. These involve separate consideration.

DX was headquartered in Tulsa, Oklahoma, and the witness Metcalf, president of Standard, testified that from 1955 to 1966 Standard, which was also Tulsa based, had purchased over 15 million gallons of liquid asphalt from DX. There was evidence, both direct and circumstantial, that the price paid by Standard was fixed by DX at a figure which was identical and constant with the price charged by other Oklahoma refiners and that DX was a part of the conspiracy to maintain the price of liquid asphalt at an artificially high figure. In short, in our view there is sufficient evidence to sustain the jury's determination that DX was a party to the conspiracy that resulted in damage to these plaintiffs.

Mobil is in a slightly different situation. Though it was a defendant in the criminal indictments returned in Missouri and Kansas, it was not a defendant nor a named conspirator in the civil antitrust action brought by the

State of Oklahoma, which has been referred to above. As indicated, however, it is plaintiffs' contention that as one facet of the overall conspiracy, Mobil, and other Kansas refiners, agreed to stay out of Oklahoma, in return for which the Oklahoma refiners agreed not to market their liquid asphalt in Kansas. There was evidence that during the years in question Mobil did not market, at least to any appreciable degree in Oklahoma, even though the price for liquid asphalt in Oklahoma was several cents per gallon higher than it was in Kansas. To counter such evidence, Mobil offered evidence of attempts to market its liquid asphalt in Oklahoma in 1966. By way of rebuttal, the plaintiffs then attempted to show that such belated efforts of Mobil were to forestall antitrust prosecution at a time when it was under investigation. In sum, our study of the record convinces us that there is sufficient evidence, both direct and circumstantial in nature, to support the jury's answer to a specific interrogatory that Mobil was indeed a party to the conspiracy in question.

ALLEGED POST-VERDICT ERROR.

Plaintiffs contend that the trial court erred in three particulars leading up to the entry of formal judgment, all occurring after the jury had returned its verdict. Before discussing those matters, let us first examine the verdict returned by the jury.

As indicated, the jury did not return a general verdict, but answered a considerable number of special verdict interrogatories. For example, by its answers the jury found that Mobil, DX, Kerr-McGee and Phillips, but not Skelly, had conspired to fix, maintain and stabilize the price of liquid asphalt purchased by the plaintiffs in Oklahoma and that such conspiracy unreasonably restrained interstate trade or commerce. By answer to another interrogatory, the jury found that the aforesaid conspiracy began in Jan-

uary 1962 and terminated in December 1966. Pursuant to direction, the jury then assessed the damages by dollar amount of Standard and Metropolitan, separately, for each year the conspiracy was in existence, i.e., 1962, 1963, 1964, 1965 and 1966. By answer to an interrogatory, the jury also found that the defendants had not "wrongfully, fraudulently or effectively concealed" the conspiracy from either of the plaintiffs. We shall now examine the errors which allegedly occurred after the return of the jury's verdict leading up to the entry of judgment.

1. *Refusal of Trial Court to Rule That the 4 Year Statute of Limitations Contained in 15 U. S. C. § 15b Had Been Tolled by 15 U. S. C. § 16(b).*

Section 15b of 15 U. S. C. provides that an action brought under 15 U. S. C. § 15 is barred unless commenced within four years after the cause of action occurred. Anticipating that this statute of limitations might be pleaded by the defendants as one of their defenses, which it was, the plaintiffs in their complaint pleaded fraudulent concealment in an effort to toll the running of the statute. In this general connection, we would parenthetically note that the plaintiffs in their complaint alleged the existence of a conspiracy in restraint of interstate trade existing from 1954 through 1966, and sought damages for each of the thirteen years of conspiracy's existence. Also, by way of general background, plaintiffs instituted the present proceedings on December 1966 against all defendants except Kerr-McGee and Phillips, who were added as additional defendants in December 1967.

In line, then, with the pleadings the pre-trial order set forth as one of the issues in the case the question of whether there was fraudulent concealment by the defendants of their conspiratorial activities. As mentioned above, the

jury found no such fraudulent concealment. Then some eight weeks after the jury's verdict, the plaintiffs attempted to inject into the proceeding the issue as to whether the four-year statute of limitations, if not tolled by fraudulent concealment, was nonetheless tolled by 15 U. S. C. § 16(b).

Section 16(b) of 15 U. S. C. provides, *inter alia*, that the institution by the United States of any civil or criminal antitrust proceeding shall suspend the running of the four-year statute of limitations in respect of every private right of action "based in whole or in part on any matter complained of in said proceeding * * *." In this regard, we are advised that the United States instituted a criminal antitrust proceeding in Missouri on July 22, 1965, wherein Mobil, Kerr-McGee and Phillips, along with many others, were named defendants and that the United States instituted another criminal antitrust proceeding in Kansas on April 5, 1966, again against Mobil, Kerr-McGee, Phillips, and others. If these criminal proceedings did suspend the running of the four-year statute of limitations, then the plaintiffs could recover damages for all five years the jury determined the conspiracy was in existence, i.e., 1962, 1963, 1964, 1965 and 1966. Jumping ahead, the trial court only allowed the plaintiffs damages for the years 1964, 1965 and 1966. The propriety of that particular determination will be examined in the next section, and for the moment we are only concerned with the correctness of the trial court's refusal to allow the plaintiffs to raise the provisions of 15 U. S. C. § 16(b).

The basic reason assigned by the trial court for refusing to allow the plaintiffs to raise the issue as to whether the criminal antitrust proceedings suspended the running of the four-year statute of limitations was that the request came too late. We agree. All parties were fully apprised by the pleadings of the case which were reflected in the pretrial order that the defendants were invoking the four-year

statute of limitations. The plaintiffs sought to avoid the statute by alleging that there was fraudulent concealment by the defendants of their conspiratorial acts. The jury by its verdict found no such fraudulent concealment. Then, weeks after the return of the jury's verdict, the plaintiffs sought to inject a new issue into the case. Under such circumstances we agree with the trial court that the request came too late in the day.

In support of our disposition of this phase of the controversy, see such cases as National & Transcontinental Trading Corp. v. International General Electric Co., Inc., 15 F. R. D. 379 (S. D. N. Y. 1954). In that case, the Honorable Irving R. Kaufman, then a United States District Judge, declared as follows:

> "Plaintiff contends that the pendency of the aforementioned action by the United States in the District Court for New Jersey suspended the statute of limitations for the period January 27, 1941, when the New Jersey action was commenced, until October 8, 1953, the date when final judgment was entered in favor of the United States. Nowhere however does the complaint allege that any of the allegations of the complaint are 'based in whole or in part on any matter complained of' in the New Jersey action. Such allegations are essential if the bar of the statute is to be avoided."

See also in this general connection Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U. S. 321 (1971), where it was indicated that a trial judge would not err in rejecting an affirmative defense which was untimely presented.

2. *Error by the Trial Court in Entering a So-called "Unitary Judgment."*

The trial court determined that the judgment to be entered against the defendants would be joint and several

and that it would include damages incurred during the "four years immediately preceding the joinder of Kerr-McGee and Phillips." As indicated above, the present action was commenced in December 1966 against Mobil and DX, along with ten other companies. However, Kerr-McGee and Phillips were not added as defendants till December 1967. By its determination that the four-year period of time would be the four years immediately preceding the joinder of Kerr-McGee and Phillips, the trial court limited the damage period to the calendar years of 1967, 1966, 1965 and 1964. By its answer to a special interrogatory, the jury had determined that the conspiracy terminated December 31, 1966. So, the judgment thus entered against the four defendants, jointly and severally, limited the plaintiffs' damages to those occurring during the three years of 1966, 1965 and 1964.

Plaintiffs now contend that such limitation was erroneous. They argue that under Fed. R. Civ. P. 20(a), judgment should have been entered for the plaintiffs according to their "respective rights to relief," and "against one or more defendants according to their respective liabilities." Hence, they say, there was no need to enter a so-called "unitary judgment."

In this general regard, the complaint is not so much that any judgment against Kerr-McGee and Phillips should be limited to damages occurring in 1966, 1965 and 1964. Rather, the problem arises in connection with Mobil and DX. The action against those two companies was instituted in December 1966, and the four years immediately preceding that date would include the calendar years of 1966, 1965, 1964 *and* 1963. As noted, *supra*, the jury did fix the damages sustained by the plaintiffs as a result of the conspiracy for that year, as well as 1962. As we understand plaintiffs' present position on this particular matter, it is suggested that a joint and several judgment against all four defend-

ants for damages incurred in the years of 1966, 1965 and 1964, which was the judgment entered by the trial court, was proper, but that such would not, and should not, preclude a separate joint and several judgment against Mobil and DX only for plaintiffs' damages occurring in 1963. We agree.

As indicated, the action against Mobil and DX was commenced in December 1966, and the four-year statute of limitations would permit the plaintiffs to recover damages from those two companies for the years 1966, 1965, 1964 *and* 1963. We fail to see how the fact that the action against Kerr-McGee and Phillips was not commenced till a year later should inure to the benefit of Mobil and DX. This is not an instance of apportioning damages among joint tort-feasors. Rather, we are simply awarding plaintiffs the damages decreed by the jury in its verdict in a manner consistent with Fed. R. Civ. P. 20(a).

In support of the foregoing, *see* Philco Corporation v. Radio Corporation of America, 186 F. Supp. 155 (E. D. Pa. 1960), at 166, and Charles Rubenstein, Inc. v. Columbia Pictures Corporation, 176 F. Supp. 527 (D. C. Minn. 1959), at 536, *aff'd*, 289 F. 2d 418 (8th Cir. 1961). In *Philco*, it was held that in a civil antitrust action the trial court was not required to enter a single judgment against all defendants which would run for the shortest period of limitation applicable to any one defendant. And in *Rubenstein*, again a civil antitrust proceeding, it was contended that the trial court could not apportion damages among tort-feasors, but must hold all defendants jointly and severally liable. In rejecting that contention, the statute of limitations there in question was held to be "personal" to each individual defendant and that there was "no good reason why damages may not be assessed against the various defendants in the amounts and according to the liabilities established." We subscribe to such reasoning.

3. *Refusal of the Trial Court to Grant Plaintiffs' Motion to Dismiss Kerr-McGee and Phillips.*

After it became apparent that the four-year statute of limitations was not to be tolled in any fashion, and after the trial court had further indicated that it proposed to enter a joint and several judgment against all four defendants for damages incurred in the years of 1966, 1965 and 1964, but not 1963, the plaintiffs in a tactical move designed to obtain a judgment for damages incurred the year 1963, as well, moved to dismiss Kerr-McGee and Phillips from the case, hoping thereby to obtain a judgment against Mobil and DX for the four years of 1966, 1965, 1964 and 1963. Not surprisingly, Kerr-McGee and Phillips consented to the granting of the motion to dismiss them from the case and Mobil and DX objected. The trial court denied the motion, and the plaintiffs and Kerr-McGee and Phillips now assign that as error.

The motion to dismiss Kerr-McGee and Phillips coming after trial and moments before the entry of judgment was a matter lying within the sound discretion of the trial court and we find no abuse of that discretion. Fed. R. Civ. P. 15(a), 21 and 41(a)(2). See such cases as Shaffer v. Evans, *per curiam*, 263 F. 2d 134 (10th Cir. 1958), *cert. denied*, 359 U. S. 990 (1959), where it was held that a motion by the plaintiff to dismiss after issue had been joined, but before trial, was addressed to the sound discretion of the trial court.

Accordingly, the judgments as entered are affirmed, but the case is remanded with direction that the trial court enter in favor of the plaintiffs a joint and several judgment against Mobil and DX only for damages incurred by the plaintiffs in the year 1963.

MARCH TERM—APRIL 27, 1973.

Before HONORABLE DAVID T. LEWIS, *Chief Judge*, HONORABLE DELMAS C. HILL, HONORABLE OLIVER SETH, HONORABLE ROBERT H. McWILLIAMS, HONORABLE JAMES E. BARRETT, HONORABLE WILLIAM E. DOYLE, *Circuit Judges*, and HONORABLE FRANK G. THEIS, *District Judge*.

Nos. 71-1115, 71-1116, 71-1117, 71-1118, 71-1119.

STANDARD INDUSTRIES, INC., A CORPORATION, AND METROPOLITAN PAVING CO., INC., A CORPORATION,
Plaintiffs-Appellants,

v.

MOBIL OIL CORPORATION, A CORPORATION, SUNRAY-DX OIL COMPANY, A CORPORATION, KERR-McGEE CORPORATION, A CORPORATION, AND PHILLIPS PETROLEUM COMPANY, A CORPORATION,
Defendants-Appellees and Cross-Appellants.

This matter comes on for consideration of the petition for rehearing and for hearing en banc of Sunray-DX Oil Company, Defendant-Appellee and Cross-Appellant; petition for rehearing and suggestion of rehearing en banc of defendants-appellees and cross-appellants; and petition for rehearing of plaintiffs-appellants in the captioned cases.

Upon consideration whereof, the petitions for rehearing are denied by Chief Judge Lewis, Circuit Judge McWilliams and District Judge Theis, to whom the cases were argued and submitted.

The petitions for rehearing having been denied by the original panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petitions for rehearing en banc are denied. Judge Holloway did not participate in the petitions for rehearing en banc.

HOWARD K. PHILLIPS,
Howard K. Phillips,
Clerk.